Establishing a tribunal system for financial disputes involving SMEs

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Financial Services analysis: Will a proposed lawyer-free forum for financial disputes provide an open and robust setting for mid-market clients, including small and medium-sized enterprises (SMEs), to hold banks to account? Richard Samuel, barrister at 3 Hare Court Chambers, explains why lawyers should be excited about the prospect of a financial services tribunal.

What is the proposal and where is it coming from?

The proposal is to establish a low-cost, accessible dispute resolution platform, mainly for SMEs that have found their disputes are often above the current Financial Ombudsman Service (FOS) threshold of £150,000 and below the claims in the low millions under which it is economically unviable to sue banks in the High Court.

The proposal originates from several well-publicised scandals concerning the mis-selling of financial products. Victims of mis-selling have, to date, not been able to get access to justice and obtain any or adequate redress. In a failed attempt to remedy this, the Financial Conduct Authority (FCA) secured a voluntary agreement with some of the largest banks whereby the banks would operate mass redress schemes for those whom they found had been mis-sold financial products. The schemes failed to gain the public's confidence because:

- they allowed the banks to be their own investigator, ie 'judge, jury and executioner' in the cases against them—the only check in the system was oversight by accountants
- they operated behind closed doors—the process was technical and administrative and not transparent to the victims
- they created a lacuna in the common law, as they did not apply the law and did not produce any reasoned judgments

The proposal is presently driven by the All-Party Parliamentary Group (APPG) for Fair Business Banking that was originally formed in 2012 by Guto Bebb MP. It was re-formed in 2016 under the chairmanship of George Kerevan MP and is now chaired by Lord Cromwell.

It was in no small part inspired by an article I wrote that year in the *Capital Markets Law Journal* ('Tools for changing banking culture: FCA are you listening?') which suggested that a permanent, independent tribunal be established to replace a system of bespoke mass redress schemes. The APPG decided to launch an inquiry into dispute resolution—and specifically this proposal—and has now come out in support of the proposal. It achieved the coup of recruiting Lord Dyson to its board of inquiry.

Andrew Bailey, CEO of the FCA, also supports the proposal. He has explained to the Treasury Select Committee that the FCA is a supervisory and regulatory body, which should not have got involved with dispute resolution. He believes that an independent body—he used the word 'tribunal'—should be charged with that task.

It is not within Mr Bailey's power, however to set up a tribunal. What does lie within his power is to broaden the remit of FOS to cover small business complaints. The FCA is duly consulting on doing so now, but it does not propose to increase the limit of FOS's jurisdiction above £150,000. This proposed expansion of alternative dispute resolution (ADR) is complimentary to establishing a tribunal, so is to be welcomed. But of itself, it does not solve the problem, which is with the cost of our primary dispute resolution mechanism—the common law courts.

How will a tribunal help SMEs resolve disputes against banks?

The APPG recognises that the common law courts are inaccessible for SMEs in dispute with their banks, mainly because they are too expensive, cumbersome and slow. Accordingly, the tribunal system will have the following characteristics:

- it will be swift, by keeping the rules simple and tailored for speed
- it will be inexpensive, by:
  - —focusing rules of procedure on lowering costs and in particular by modifying the 'loser pays' rule
  - —introducing an inquisitorial element to assist those who cannot afford legal representation
- it will be an expert forum, as judges will be drawn from the commercial bar and judiciary, and the wing members from the financial services industry and the small business sector
- it will be authoritative, as it will produce high quality, publicly reasoned judgments subject to appeal, which explain how the law applies in practice

A tribunal established according to these principles will give the public confidence that there is an independent, open and robust forum in which mid-market clients, including SMEs, can hold banks to account where necessary. In time, that forum will create a body of law to fill the gap between the High Court and FOS that the mass-redress schemes were supposed to fill.

How effective have such tribunals been in the past?

They have had a transformative effect. One need only look at the employment tribunal (ET). Before ETs were established in the 1960s, employees could only go to court to claim their notice period under the common law. The inequality of bargaining power meant notice periods were short. The common law spoke in terms of 'master and servant'. The costs of recovering unpaid notice were great, so employers could act with impunity. Lord Donovan saw the need for an ET as a place for employees to exercise new rights of unfair dismissal and, later, discrimination. Employers who abused their power could be called to account at public hearings for the first time.

The tribunals generated a tidal wave of case law on what it actually meant to dismiss a worker unfairly or discriminate on grounds of race or sex. Other tribunals, just like the ET, levelled the playing field between unequal parties, whether it be disputes about a tax charge or refusal of social security payments, a lessee against a landlord or a small business complaining about a large business abusing its dominant market position. Tribunals contributed greatly to creating the culture we live in today. They could change banking culture in the same way, thereby answering a real need.

How would tribunals prevent scandals, such as Royal Bank of Scotland's Global Restructuring Group (GRG) scandal, from recurring?

My understanding of the Royal Bank of Scotland GRG scandal is that SMEs were transferred to the GRG once in distress—indeed, the allegations include some businesses being pushed into GRG which were not in distress. Thereupon, GRG would increase charges and, in some instances, take effective control of the business in RBS's interest rather than the business's. Overall, GRG stands charged of abusing its power to asset strip distressed companies.

RBS's right to transfer the businesses into GRG derived from generous contractual terms it was powerful enough to impose on SMEs. It appears that behind those generous powers a culture built up in GRG, no doubt through the creation of negative incentives, to exploit the businesses under its control for profit. The GRG was publicly declared to be, in the bank's words, a 'hospital for sick businesses', rehabilitating a business in difficulty. Instead it appears that, privately, RBS was treating GRG as a profit centre and expecting its employees to maximise revenues from that division. That disconnect between appearance and reality has caused great anger and resentment. This behaviour appears to have peaked when the bank itself was in trouble in 2008 and needed to shore up its own balance sheet. The feeling among the businesses in GRG is that they were unfairly exploited by RBS which abused the generous contractual rights it enjoyed.

A poor culture, such as that in RBS's GRG, thrives off secrecy. The cost of suing banks is prohibitive for most healthy businesses. It is an impossibility for a distressed company because it is dependent on the bank it is suing for cashflow. It is the knowledge that these SMEs could not expose misconduct to public scrutiny that caused the bad culture in GRG to thrive. We have seen the same effect in sexual assault over recent years—criminal courts have changed practice to encourage vulnerable witnesses and victims to come forward who were previously deterred from bringing charges. Police now think hard before dismissing victims' allegations. That brings its own problems of getting the balance right between the accuser and the accused. But the status quo in our courts that excluded too many victims in sexual assault cases was no longer acceptable.

A tribunal is about lowering the barrier to entry for SMEs who wish to complain in a public judicial forum of bad banking conduct. A tribunal which affords SMEs that opportunity—even for SMEs in distress—will destroy any expectation in banks that they can keep bad behaviour away from the public gaze. Once the expectation of secrecy is destroyed, good culture will replace bad where it exists.

This is not about bashing banks. It is applying what we know from all areas of dispute resolution to build a system that prevents bad apples in banks from exploiting the power asymmetry of small business and destroying the reputation of our world-class banking sector in the public mind.

What role, if any, will lawyers play? Are there any other points lawyers should be aware of?

Lawyers should be excited about a financial services tribunal—some might cynically say because lawyers stand to make more money out of those banking cases, but I would say because granting greater access to justice will allow a specialist bar to grow—like today's employment bar—and so drive down the cost of justice to claimants.

Tribunals are designed to make it easier for claimants to bring cases with limited or no legal support. But, as with all the other established tribunals, lawyers will have the opportunity to play a central role:

- Lawyers will provide initial advice or formal legal opinions on the strength and merits of the case and any subsequent appeals. They will be able to interpret and apply the law put forward by the tribunal, and offer non-contentious ongoing advice on the basis of the tribunal judgments.
- Upon commencement of proceedings, lawyers will be able to assist with disclosure and drafting of witness statements including expert evidence and skeleton arguments. As rules of procedure will be streamlined and simplified, lawyers will likely spend less time on matters, meaning that legal advice will be cheaper and more accessible to claimants.
- Advocacy and representation during the hearing is a key function that may be provided by lawyers. This will open up possibilities for non-UK lawyers to support their non-UK clients in hearings, with the support of UK co-counsel. Tribunals may also have duty solicitors or barristers, like ETs currently have.
- The tribunal will be able to make a determination on paper on a matter brought before it, which will be cheaper and quicker than a full hearing. Lawyers will be able to draft applications and provide the relevant evidence to ensure an appropriate determination is made.
- The tribunal will connect to an appellate tribunal and from there to the Court of Appeal. Lawyers will be well-placed to assist with cases which progress that far.

Richard Samuel has a broad commercial practice and is instructed in a range of areas including contract law, fiduciary duties, company law, negligence and employment law. Richard's work has a strong international dimension stemming from his arbitrations, covering disputes from a range of jurisdictions. Underpinning his practice is a strong involvement with advocacy training. Richard is frequently invited to lecture on advocacy skills and to teach lawyers from jurisdictions worldwide.

Richard would like to thank Michel Reznik for his valuable input throughout the interview. Michel is president of IAA London, an association of international lawyers operating in the capital.

Interviewed by Kate Beaumont.